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Early Takeaways from the Deepwater

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the discussion of vital law

and policy debates in the areas of energy, environmental law, and

international arbitration.

Jeremy Brown September 11, 2014 Last week, Judge Carl Barbier of the Eastern District of Louisiana issued an opinion in the first phase

of the trial over the Deepwater Horizon disaster, which remains the worst offshore oil spill in U.S.

Horizon Decision

and April 2013 and focused on liability for the disaster. The second was conducted between September and October 2013 and focused on the response to disaster and the amount of oil spilled. The third phase is scheduled for January 2015 and will focus on penalties

The court had previously split the trial into three phases. The first was conducted between February

reaches the following conclusions: British Petroleum (BP) is subject to enhanced civil penalties under the Clean Water Act (CWA) because it acted with gross negligence. News articles about the opinion have reported that the ruling could ultimately lead to CWA penalties as high as \$18 billion.

Last week's opinion is for the first phase. It is 153 pages long, includes extensive fact findings, and

· BP is liable under general maritime law for reckless conduct. Transocean and Halliburton are liable for negligence. Among these three defendants, the opinion apportions the fault as: 67

may be legally to blame, much of their financial liability may eventually fall to BP.

percent for BP, 30 percent for Transocean, and 3 percent for BP. However, the contracts

between BP and Transocean and Halliburton include indemnity and release clauses, which the

court found to be valid and enforceable against BP. Even though Transocean and Halliburton

- · BP deserves punitive damages under general maritime law, but Fifth Circuit precedent prohibits their imposition. Case law in other circuits, however, will likely be more accommodating. . The liability caps that are available under the Limitation of Liability Act and the Oil Pollution Act do not apply
- As happens with catastrophes, the Deepwater Horizon disaster sparked a tremendous amount of

litigation. The Eastern District has previously ruled on a range of matters and, as example of the

factual and legal complexity of the disputes surrounding the spill, it overruled itself regarding liability under the OPA, noting that "[t]he Court has a far better understanding of the importance of cementing in offshore wells than it did in 2012, when it ruled on the Government's motion." (As another example: BP entered into a settlement agreement with individual and business plaintiffs in 2012 but

. BP is liable for damages and cleanup costs under the OPA. Additionally, Transocean is liable

under the Oil Pollution Act of 1990 for governmental cleanup costs.

Clean Water Act Penalties

figure to follow.)

recklessness.

presented only a "vague" answer

encountered high pressure geological formations.)

Maritime Law Liability

injury."

has since been fighting over its interpretation, with a Fifth Circuit decision issued in May and BP now appealing to the U.S. Supreme Court.) In latest opinion, in addition to his fact-finding, Judge Barbier analyzed the legal issues summarized

substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act." (33 U.S.C. § 1321(b)(3).) As a means of enforcing this prohibition, "any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of [this prohibition], shall be subject to a civil penalty in an amount up to \$25,000 per day of violation or an amount up to \$1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged." (33 U.S.C. § 1321(b)(7)(A).)

The CWA increases this limit for any discharge that "was the result of gross negligence or willful misconduct of a person described in subparagraph (A)" to "not less than \$100,000, and not more than \$3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged." (33 U.S.C. § 1321(b)(7)(D). (EPA regulations have further increased the \$3,000 amount to \$4000, however, and Coast Guard regulations have increased it to \$4,300. The court declined to decide at this point which

The Oil Pollution Act of 1990 (OPA) amended the CWA to prohibit "[t]he discharge of oil or hazardous

In the latest opinion, the court found that BP was also subject to civil penalties under § 1321(b)(7)(D) because it had acted with "gross negligence" and engaged in "willful misconduct." To reach this finding, the court had to construe the terms "gross negligence" and "willful misconduct," neither of which are defined in the CWA. The United States Department of Justice (USDOJ) argued that gross negligence was an extreme departure from the appropriate standard of care. BP

The court observed that the statute separated "gross negligence" and "willful misconduct" by the disjunctive "or," which it took as a sign that the terms should have distinct meanings. As further evidence in support of this reading, the court looked to text of the broader OPA, which in other sections distinguishes between "gross negligence" and "willful misconduct," and to the legislative history, which does the same.

conduct will naturally and probably cause injury (constructive intent or recklessness)."

should not matter to the interpretation of a federal statute, but the lower court in Citgo cited the Louisiana standard and found that the defendant had not committed gross negligence by discharging wastewater storage tanks into surrounding waterways USDOJ appealed that case to the Fifth Circuit, which upheld the lower court, finding that it may have cited the Louisiana standard but did not actually rely on it. BP has already vowed to appeal Judge Barbier's decision, and it will presumably flag for the Fifth Circuit the potential conflict between the Deepwater Horizon opinion and the Citgo opinion.

employees unless it had authorized or ratified the conduct. BP based this position on the common law torts rule on punitive damages. But the court returned to the language that the OPA added to the CWA as § 1321(b)(7)(A), which establishes liability for "any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility." For that section, the CWA defines a "person" as an "individual, firm, corporation, association, and a partnership." That the CWA does not require the involvement or knowledge of a particular level of corporate management - as a pre-OPA version of the CWA did - supported vicarious liability for BP, the court found.

Under general maritime law, the standard for stating a negligence claim is that "the plaintiff must demonstrate that there was a duty owed by the defendant to the plaintiff, breach of that duty, injury sustained by the plaintiff, and a causal connection between the defendant's conduct and the plaintiff's

For Phase 1, the court examined only the standard of care, nature of breach, and causal connection surrounding the oil spill and the explosion and malfunctions that preceded it, it expressly recognized that it was not considering any sort of tortious relationships with onshore hotels or others who had

have followed that much higher. (For example, the well was drilled in deep water and had

suffered similar injuries. The court found that all of the same conduct that made BP grossly negligent under the CWA also made it grossly negligent under maritime law. It cycled through the various errors made by Transocean and Halliburton. For Transocean, the court observed that "BP had a hand in most of these errors" and that "the proper actions taken by the marine crew following the explosions" helped to mitigate. "BP's conduct, by contrast, lacks similar balance." Given this, the court found Transocean and Halliburton negligent and BP grossly negligent. **Punitive Damages**

The court declined to award punitive damages. Although federal maritime law generally allows for punitive damages in the case of reckless, willful, or wanton conduct, the Fifth Circuit rule "is that operational recklessness or willful disregard is generally insufficient to visit punitive damage upon the employer. Rather, the conduct must emanate from corporate policy or that a corporate official with policy-making authority participated in, approved of, or subsequently ratified the egregious conduct." Plaintiffs argued that Deepwater Horizon was distinguishable from the precedential case (In re P&E Boat Rentals) because the latter centered on a crewboat that was a small part of a company's much

At the request of the State of Alabama, the court made findings about punitive damages under the maritime laws of the two other jurisdictions - the First Circuit and the Ninth Circuit, both of which

larger operations while the Macondo well was a central part of BP's business. The court agreed with interpretation

Limitation of Liability Act

OPA Liability Caps

into offshore waters.

shorelines or the exclusive economic zone.

operator of such facility or vessel."

regulation."

would have allowed punitive liability to attach.

the owner's interest in the vessel." The limit on liability does not apply, however, if the damage or injury was within the "privity or knowledge" of the owner. The court found that Transocean - which owned the Deepwater Horizon made various mistakes that amounted to "privity or knowledge." For that reason, the act could not shield the company from liability.

OPA includes liability caps for certain spill-related damages. The caps do not apply to incidents proximately caused by "the violation of an applicable Federal safety, construction, or operating

At an earlier stage of the Deepwater Horizon proceeding, USDOJ had argued that the incident had stemmed in part from a violation of a federal regulation requiring that wells must be cased and cemented to "[p]revent the direct or indirect release of fluids from any stratum through the wellbore

The Limitation of Liability Act, as the U.S. Supreme Court explained in Lewis v. Lewis & Clark Marine, was enacted in 1851 to encourage shipbuilding by "allow[ing] a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or

The court had, in its own words, "respond[ed] that the regulation was equivalent to a regulatory prohibition on oil spills, and therefore could not be relied upon to lift the liability cap as it would tend to circumvent the 'proximate cause' requirement in OPA." Citing a "far better understanding" of cementing, the court reversed its earlier ruling in part and found that OPA did not cap liability. OPA Liability for Outer Continental Shelf Facility

The court found a tension between Section 2702 and Section 2704(c)(3): the latter made an "owner or operator" liable for all governmental removal costs even though the former made a "responsible party" liable for all costs to all parties, private and governmental alike.

The OPA assigns multiple meanings to "responsible party." One is for "vessels," another is for "onshore facilities," and so on. For "offshore facilities" - which would encompass the Deepwater Horizon - the term refers to a "lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located." As the lessee of

might face liability under another OPA statute, namely 33 U.S.C. § 2704(c)(3), which provides that "all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or

Outer Continental Shelf property known as Mississippi Canyon Block 252, BP was the responsible The OPA defines an "owner or operator" as meaning, "in the case of an onshore or offshore facility, any person owning or operating such facility." The court speculated that the overlapping liabilities for "responsible parties" and for "owners or operators" under Sections 2702 and 2704(c)(3) was probably

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In an earlier ruling, the court determined that BP was subject to civil penalties under § 1321(b)(7)(A). countered that, in addition to this objective element, gross negligence included a "culpable mental BP and USDOJ generally agreed on the meaning of "willful misconduct," which BP defined as "the defendant actually intending to cause injury (actual intent), as well as the defendant knowing that its Because of the emphasis on subjectivity in its proposed definition of "gross negligence," and because of the emphasis on the same in its definition of "willful misconduct," BP portrayed the two terms as being synonymous with each other, according to the court, with both terms essentially meaning For these reasons, the court adopted the definitions advanced by USDOJ. It noted in passing that, following Phase 1 post-trial briefing, the Fifth Circuit issued United States v. Citgo Petroleum Corp (Citgo), an opinion that questioned the proper definition of "gross negligence" under the CWA but In a footnote, the court explained that Louisiana law sets a higher standard for gross negligence. That After unpacking the meanings of "gross negligence" and "willful misconduct," Judge Barbier itemized the various decisions by BP that either on their own or in aggregate would qualify for these terms and thus subject the company to enhanced civil penalties. He stressed that the Macondo well had been plagued by challenges and difficulties from the start, which raised the standard of care that BP should BP defended that it could not be held liable for gross negligence or willful misconduct committed by its

The OPA has a general liability provision, codified at 33 U.S.C. § 2702. It imposes removal costs and damages on "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining In a previous ruling, the court found that Transocean was not a "responsible party" but noted that it

the result of "legislative oversight." Nonetheless, it found that Transocean could be deemed an "operator" because of the operations it controlled at the drill site (i.e., its crew could shut in the well without direction or approval from BP), making the company liable for cleanup costs.